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December 18, 2000

BY HAND

Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No.1)
1925 K Street, N.W.
Washington, DC 20423-0001

Re: Major Rail Consolidation Procedures (STB Ex Parte No. 582 (Sub-No. 1))

Dear Mr. Williams:

Enclosed for filing in the above-referenced proceeding are an original and 25 copies of the Reply Comments of Canadian National Railway Company. All pages of this filing, including this cover letter, are paginated consecutively, as required by the NOPR (slip op. at 38).

Also enclosed is a diskette containing the text of this filing in WordPerfect 6/7/8/9 format.

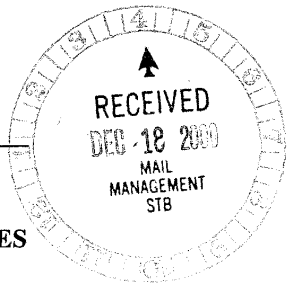
Very truly yours,

Paul A. Cunningham/RGH

Paul A. Cunningham

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY

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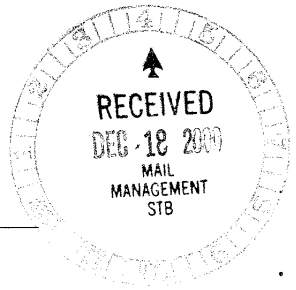
December 18, 2000



BEFORE THE
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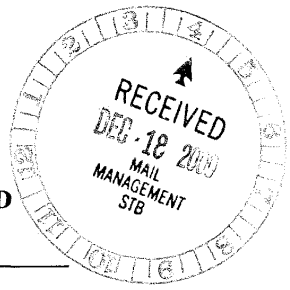

BEFORE THE
SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF CANADIAN NATIONAL RAILWAY COMPANY

Canadian National Railway Company, Grand Trunk Western Railroad Incorporated, and Illinois Central Railroad Company (collectively, "CN") hereby file reply comments pursuant to the Board's Notice of Proposed Rulemaking, Major Rail Consolidation Procedures, served October 3, 2000 ("NOPR").[1]

I. COMPETITION

Conditions to enhance competition. The Board proposed that applicants be required to identify conditions to enhance competition, in addition to the competition-enhancing effects that can flow directly from a merger itself. The Board received comments in opposition to this proposal from CN (CN Opening Comments 10-15) and numerous others. CN sees no need to add to the record at this point, with one brief exception.

Although it opposed the proposed requirement, CN suggested that the Board "could allow enhancement through conditions as an option for applicants in the unlikely event that

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[1]In these reply comments CN uses the abbreviations and short-form citations listed in Appendices A and B in the NOPR. CN will refer to the comments of other parties filed on November 17 as "opening comments."

there are identified competitive harms that are not directly and proportionately remediable." *Id.* at 13-14 n. 10. CN noted that providing this option "would avoid imposing a per se rule that would unnecessarily displace the market with regulation, causing applicants to forego mergers that would in fact confer substantial net public benefits." *Id.*

Like many others, NS urged the Board to eliminate the requirement that applicants propose conditions to enhance competition. NS proposed, however, a variant of an option-alternative with which CN disagrees. NS would have the Board amend proposed § 1180.1(d) to state that, in determining whether a merger is consistent with the public interest, the Board "will give substantial weight to conditions proposed by applicants to enhance competition." NS Opening Comments 68.

There is no basis upon which the Board could determine in advance that such conditions should always be given "substantial weight." Some of these conditions may be trivial, some important. Some may be unnecessary in order for the Board to find that a particular merger is consistent with the public interest, for example, where all identifiable harms are in fact remedied.

Moreover, what should be no more than an option (as proposed by CN) would, under NS's proposal, become the de facto norm. Such a statement by the Board would convey that a failure to propose such conditions would always count as a significant negative in the public interest balancing. This statement would further increase the perceived regulatory costs of mergers and the potential of the rules to deter mergers that otherwise would in fact bring net public benefits. Such a provision would also further encourage opportunistic behavior by shippers seeking to exploit the uncertainty to gain additional rail access. The Board does not need to adopt a rule in order for merger applicants to propose conditions that would increase rail-to-rail competition. There was no such rule in place when NS and CSX proposed the Shared Assets Areas in the Conrail proceeding, or when UP proposed to

introduce single-line competition into the I-5 corridor through its agreement with BNSF in the UP/SP proceeding.

Terminal railroads. Wisconsin Central proposes that, where a major transaction would "further concentrate the ownership of [a 'neutral'] terminal carrier . . . the Board's regulations should provide for the divestment of part of the merging carriers' interest in the terminal carrier to other railroads in the area – preferably . . . to carriers that currently have no ownership interest in the terminal road." WCS Opening Comments 5. There is, however, no inherent reason why an increase in the concentration of ownership of a terminal railroad should reduce its neutrality. Perhaps WCS believes that terminal railroads are sufficiently neutral only in providing service to their owners, and not to non-owners, but that is not a merger-related issue. And if a merger would so increase the combined ownership share of the merged railroad that it would gain control of the terminal railroad, that transaction would be subject to Board approval as a change in control.[2] There is no basis on which the Board could or should adopt WC's proposal.

II. DOWNSTREAM TRANSACTIONS

None of the opening comments makes an affirmative case for the Board's downstream transactions proposal. Many parties appear to share a premise -- that the next major transaction is likely to lead to others -- but none has demonstrated how that premise could justify the Board's proposal or any variant of it. No party has shown how the rule would enable the Board usefully to take into account the prospect of subsequent mergers, why there is any well-supported reason to believe that the subsequent mergers would be contrary to the public interest, and why, if they were, the Board would approve them. A response to these questions would require answering the fundamental objections posed by CN and others in their comments in the ANPR and in this NOPR. These objections

[2] *See UP/SP*, Decision No. 44, slip op. at 165-66 (exempting change in control of a terminal railroad from otherwise applicable control provisions of ICCTA).

demonstrate that the Board's proposed exercise in unprecedented regulation would bring no public benefit and substantial public costs.[3]

Shippers and governmental parties. ACC (formerly CMA) and the American Plastics Council (together, "ACC/APC") say nothing about the proposal, which is true of a substantial majority of non-rail parties, both private and public.[4] NITL offers no more than a general endorsement and a suggestion for a word change.[5] A few other shippers offered a general endorsement.[6] DOT "shares the Board's concerns" regarding downstream mergers but provides no defense of the proposal and instead cautions about "deciding cases . . . based upon even the most persuasive version of future events."[7] USDA and DOD offer general endorsements, again without any attempt to demonstrate that the proposed rule would in practice be workable or useful.[8]

Several non-rail parties floated alternatives to the Board's proposal. They made no effort to resolve the fundamental objections to it and, in some instances, explicitly offered their alternatives as a way of avoiding its inherent problems. For example, IMPACT renews its proposal that the Board impose a rolling moratorium, under which the Board would refuse to consider any Class I merger proposed within 36 months after the "implementation" of a

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[3]*See* CN Opening Comments 16-20; CN ANPR Opening Comments 16-28.

[4]*See, e.g.*, opening comments of AF&PA; NMA; PPG; PPL; TIA.

[5]NITL would change "with as much certainty as possible" to "with reasonable certainty." NITL Opening Comments 31.

[6]*See, e.g.*, APTA Opening Comments 4; CPPA Opening Comments 3-4; DuPont Opening Comments 5-6; TFI Opening Comments 12; WCSC Opening Comments 4; Williams Opening Comments 17 (Verified Statement of Tom O'Connor).

[7]DOT Opening Comments 20-21. It will be recalled that DOT earlier characterized inquiry regarding downstream transactions as not lending itself to "verifiable evidence, quantification, and expert testimony." DOT ANPR Opening Comments 36. DOT supported inquiry into downstream effects "however illusive." *Id.* at 4.

[8]*See* USDA Opening Comments 21; DOD Opening Comments 5.

previous merger of Class I railroads. IMPACT Opening Comments 19. IMPACT's rationale for this alternative, far from answering the numerous objections to the Board's proposal, is that the Board's proposal to consider downstream transactions "may prove difficult to apply in practice," and that the predictions and estimates involved would be seen as "controversial" and "speculative." *Id.* at 19.

On its merits, IMPACT's rolling moratorium would of course represent a severe distortion of the market for control that could not possibly be justified on this or any other record. It could, for example, produce a rush of merger proposals designed to get through the regulatory door before it closes for a multi-year period.[9] IMPACT itself tries to mitigate its proposal by proposing to allow the Board to consider merger proposals filed as "responsive" applications in the pending proceeding. The downstream transactions at issue, however, would not qualify as "responsive" applications under the Board's rules.[10] And, in any event, forcing the timing of transactions (file in the pending transaction or wait at least 36 months) would distort the capital markets still further.[11]

As with IMPACT, other non-rail parties that generally support some form of downstream examination and that offer alternatives to the Board's rule premise their

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[9]Depending on what IMPACT means by "implementation," the rolling moratorium would amount to more than 36 months, because implementation of major mergers ordinarily takes some years, which would precede the 36-month period. IMPACT's proposal could give the parties to the last preceding transaction the power to control the duration of the moratorium by deferring completion of their implementation, thereby deferring new competition from the next transaction.

[10]49 C.F.R. § 1180.3(h) states that a "responsive application" is one that seeks "affirmative relief either as a condition to or in lieu of the approval of the primary application."

[11]IMPACT would also authorize the Board to waive the 36-month rule if "the Board were convinced that a new merger could be effected without injury to the public." *Id.* at 21. Under this proposal, waiver would in effect require a merits determination, which makes the waiver option unworkable as a practical matter, and yet another regulatory hurdle and source of uncertainty.

alternative proposals on the flaws in the Board's proposal and do not add anything to the record that could support that proposal.[12]

Railroads. The comments of the Class I railroads underscore the speculative nature of downstream review, and provide nothing to overcome that and the other fundamental objections already in the record.

BNSF, points out, as CN has, that it is not clear what the Board "would or could do" with projections of downstream transactions. BNSF states that the proposal would lead to "abuse and prolongation of the regulatory process," require evidence that would be "impossible and speculative," leave the Board with "no reasoned basis to select among various hypotheticals," and could lead to "perverse results." BNSF Opening Comments 43-44.

CN identified at length in its ANPR comments the fundamental objections to consideration of downstream transactions, all of which apply to the rule that the Board has proposed. CN's NOPR comments add additional considerations that militate against the proposal. CN Opening Comments 16-20.

CSX provides only a brief endorsement. CSX Opening Comments 12.

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[12]For example, P&G proposes an alternative to the Board's proposal and states that the Board should *not* require applicants to "anticipate the reaction of the other Class I railroads." P&G Opening Comments 6. Instead, P&G would have the Board establish a period of time for the other Class I railroads "to respond for themselves on the matter." *Id.* If they responded, P&G would have the Board stop everything until everyone had filed, at which time the Board would review "all of the proposed mergers . . . as a package." *Id.* This proposal, that the Board decide nothing until it decides everything, is another variation of a rolling moratorium. It is unwise, unworkable, and beyond the Board's authority.

A variant of this central planning approach is the suggestion of ORDC, which states that, under the Board's proposal, the "permutations of downstream impacts could be overwhelming." ORDC Opening Comments 12. ORDC states that the country would be better off if "the Big Six railroads came forward at once with a proposed 'Final Solution' and the STB and its Canadian and Mexican counterparts took as long as was needed to sufficiently analyze the results." *Id.* ORDC recognizes that its proposal is "probably beyond the scope of Ex Parte 582 , and current statutory constraints on the decision process." *Id.* CN agrees.

KCS considers the proposal "unmanageable." KCS Opening Comments 21-22.

UP states that the proposal is "misguided" and would require "excessive speculation." UP Opening Comments 4.[13]

NS and CP profess to support the proposed downstream rule, but their objections to certain parts of it are so central that they confirm the fundamental flaws in the rule itself. NS, objecting to the proposal with respect to benefits, states that it would be "prohibitively burdensome" for the Board to require merger applicants "to prepare alternative merger impact analyses (replete with separate operating plans, traffic studies, SAPs, pro forma financial statements, etc.) for every potential combination of hypothetical downstream rail consolidation transactions." NS Opening Comments 51. In other words, the Board cannot reasonably require in-depth consideration of downstream transactions. NS adds that a requirement to "measure" benefits in light of anticipated downstream mergers would be "unlikely to yield information helpful to the Board's merger review" because of the "inherent speculation involved in analyzing purely hypothetical downstream transactions." *Id.* at 51-52. The "inherent speculation," however, would not be removed by the clarification suggested by NS; it is inevitable in any variant of a downstream transactions rule.[14]

CP, like NS, asks the Board to delete the portion of the downstream proposal that relates to benefits, and further urges the Board to change the provision regarding conditions so that applicants would be required to explain only "whether any conditions . . . would likely require modification if a follow-on merger were to come to pass." CP Opening Comments 19. Even here, CP states that "the public would be best served if the Board deferred decision

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[13]Among other railroads, Wisconsin Central states that the downstream proposal is too speculative and that the Board should not attempt to decide the final structure in "one swoop." WCS Opening Comments 11. Tex-Mex does not discuss the proposal.

[14]The logic of NS's objection to Board review of the hypothetical benefits of downstream transactions applies to review of the equally hypothetical costs of such transactions. That the Board cannot, without speculation, estimate either downstream benefits or costs only underscores that downstream review can serve no useful purpose.

concerning such modifications until the actual facts relating to responsive consolidation proposals are known." *Id.* at 19. CP also opposes "springing conditions" (conditions imposed in a pending merger to take effect in the event of a downstream merger). *Id.*

CP thus does not want consideration of downstream transactions to affect the Board's decision in the pending merger concerning either benefits or conditions. This position simply underscores the point demonstrated by Professor Black in his verified statement that accompanied CN's opening comments: "If the STB could conduct downstream review perfectly – with accurate prediction of the future efficiency gains from downstream mergers – it would be virtually certain that the STB's decision on the merger before it would be the same, with or without downstream review." Verified Statement of Professor Bernard S. Black on Behalf of Canadian National Railway, at 10 (Nov. 17, 2000) ("Black V.S.").[15] Neither the Board nor any party has answered the question posed by CN during the ANPR: "what would the Board do with evidence of downstream transactions?" CN ANPR Opening Comments 22.

In fact, CP's objections, although nominally directed at the proposals concerning benefits and conditions, go to the heart of the downstream proposal itself. CP states that applicants "would have to predict not only which carriers might merge in response to their transaction, but also when such transaction(s) would be proposed, approved, consummated, and implemented." CP Opening Comments 17. Even if applicants could predict the timing, they could not know "critical elements" of the downstream transaction such as its "precise structure"; "operating plans and marketing strategies"; "new services and facilities investments"; the "competitive or other conditions" in the downstream transaction; and "the likely reaction of shippers to the service offerings of the hypothetical merged carrier." *Id.* Moreover, "applicants would, no doubt, seek discovery of other Class I carriers' internal

[15]Page references are to the internal pagination in the Black Statement, which is located at the top of each page. The consecutive pagination is at the bottom of each page.

studies or Board of Directors presentations regarding possible merger partners or the potential benefits of various consolidation transactions. Railroad CEO's would be pressed in depositions to divulge information regarding their discussions with other carriers concerning merger or other joint strategic ventures." *Id.* at 18.

These objections would not be cured by deleting the requirements concerning benefits and conditions. The downstream rule would still require applicants to "anticipate what additional Class I merger applications are likely to be filed in response to their own application and explain how, taken together, these applications could affect the eventual structure of the industry and the public interest." Proposed § 1180.6(b)(12)(i). For example, the requirement to anticipate "likely" downstream transactions will still lead to the discovery that CP describes -- or to sheer guesses.[16] The Board's proposed rule cannot be made right even by deleting most of it.

UP believes that the flaws in the Board's proposal could be avoided by replacing the proposed rule in its entirety with a requirement that applicants "evaluate the effects on competition and the public interest of combining all Class I railroads in the United States and Canada into two North American Class I railroads." UP Opening Comments 26. Under this proposal, there would be no requirement to try and identify particular future mergers. But the premise is unsustainable: that an abstract industry structure can be evaluated to a sufficient degree that it could directly affect a Board decision in a pending merger, either causing the Board to approve a merger that it would otherwise disapprove, or to disapprove a merger that it would otherwise approve.[17] Any such evaluation in the *BN/SF* transaction, for example,

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[16]There may well be mutually exclusive downstream transactions that appear equally plausible, such as UP/NS versus UP/CSX. The one certainty is that both will not occur, yet there would be no reasoned basis for addressing one rather than the other. The Board's proposal would require applicants "to guess about the intentions of other parties who can speak definitively on their own behalf." CN ANPR Reply Comments 32.

[17]UP opposes the imposition of "springing conditions." UP states that the predictions necessary to impose such conditions are "doomed to fail," and that such conditions would in (continued...)

would have been wholly erroneous if it failed to anticipate the 4000 miles of trackage rights that BNSF received in the *UP/SP* merger, and the opening up of the I-5 corridor to single-line competition. Yet, as UP itself asks, "how many people could have guessed in 1995" (in the *BN/SF* proceeding) that a UP/SP transaction would have those results? UP Opening Comments 4. Moreover, the abstract evaluation UP proposes would strain to the breaking point the statutory concept that the Board is to evaluate the effects of the "transaction" before it. *See* 49 U.S.C. § 11324(b)-(c).

UP asserts that, under its proposal, applicants and other parties could address whether a single railroad serving both coasts would be "manageable and responsive to its shippers." UP Opening Comments 26. Any supposed answer to this inquiry, however, whether "yes," "no," or "maybe," could not determine the Board's decision in the pending merger proceeding, which, as just noted, is whether the "transaction" before it is consistent with the public interest. Nor could any "yes" or "no" answer be defensible. CN doubts, for example, that UP considers its management, intellectual capital, corporate culture, and track record, to be fungible with those of the other Class I railroads, yet any useful assessments of manageability and responsiveness would depend heavily on such railroad-specific factors. There is no abstract answer to these types of questions, which, in addition to the factors just cited, turn on such matters as "organizational structure, prior presence in these markets, and information technologies (which, as UP emphasizes elsewhere, are rapidly evolving)." CN ANPR Reply Comments 38.

UP presents its proposal as a way to avoid speculation, but heightening the abstraction is no antidote to speculation and cannot somehow enable parties to generate useful evidence in a merger proceeding. UP's proposal is, in short, fit for a seminar – perhaps, as CN will

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[17](...continued)
any event violate both due process and the Administrative Procedure Act. UP Opening Comments 5-7.

discuss below, one that the Board could usefully convene -- but is not fit for actual merger proceedings that have legal and economic consequences.

What the Board could reasonably do about downstream transactions:

(1) Conduct a workshop on transcontinental mergers. If the Board believes that it needs to become more cognizant of issues likely to arise in connection with transcontinental mergers, and that a generic inquiry could be useful in that regard, then it should forthrightly conduct such a seminar. Such a seminar should be tightly focused on issues that parties believe relate to such mergers in particular, as distinct from other types of mergers. CN does not believe that the Board has such a need. But, if the Board is of a different view, there are recent precedents for how the Board could do so.

CN describes in the Appendix to these comments recent workshops by the FTC on the implications for antitrust enforcement of the rise in B2B markets, and of globalization and technological innovation. These instances illustrate how a regulatory agency need not propose or adopt new rules in order to enrich its understanding of an area subject to its case-by-case jurisdiction.

A similar workshop on transcontinental mergers would be far preferable to injecting abstract and ultimately meaningless issues into particular merger proceedings. The Board has already laid the foundation through its oral hearings in March, 2000, the ANPR round of comments, and the NOPR comments. The Board could make clear that it does not consider the workshop as an occasion to reiterate views already in the Ex Parte 582 record, but instead as the occasion for those who believe there are matters relating only and generically to transcontinental mergers to identify what those matters are. The Board could invite parties to provide information or identify ways of analyzing the kinds of efficiencies that a transcontinental railroad could bring, the existing or potential demand for transcontinental rail services, the bearing of globalization and international trade, ways of identifying relevant markets for competition analysis, the significance of the vigorous competition in two-railroad

markets that exists today, the framework for analyzing possible effects on incentives or ability to exercise market power, labor issues, issues of managerial control and customer responsiveness, the significance of new information technologies, and the likelihood and consequences of failure of one of two systems.[18]

In its ANPR comments, CN noted that, "[w]ith such a record in hand, potential applicants for an East-West transcontinental transaction would evaluate their options and frame any transaction accordingly, and, if such an application were presented, the Board would evaluate the merits in light of the knowledge gained (which might include the knowledge that the Board's longstanding approach to individual mergers remains the proper approach in the transcontinental context)." CN ANPR Comments 20-21.

(2) Either (a) leave the existing one-case-at-a-time rule in place but broaden the class of persons entitled to petition for its waiver or (b) repeal the rule but without imposing an across-the-board requirement on applicants. There really are two issues before the Board with respect to downstream transactions. The first is whether to repeal the present rule. The second is whether, if the Board repeals the present rule, the Board should then (a) forfeit control of the downstream inquiry, as it will if it adopts its proposal or any of the variations urged by NS, CP, UP, and other parties, or (b) retain control of any such inquiry by not imposing a new rule, and instead entering upon any such inquiry only on the basis of particularized showings and crafted orders in the specific context of particular cases. The latter is by far the better course, if the Board believes that it should repeal the present rule.[19]

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[18]During the ANPR, CN suggested that the Board might conduct an informational proceeding in parallel with the NOPR for the purpose of receiving comment on these matters. In view of the NOPR, a workshop conducted over several days would now be a more appropriate format.

[19]CN notes that the Board already can waive the one-case-at-a-time rule on its own motion, as it recently did in the BNSF/CN proceeding. *See BNSF/CN*, Decision No. 1A, slip (continued...)

The ANPR and NOPR process has worked as it should, illuminating the pros and cons of the Board's proposals and those of other parties. With respect to the downstream rule, the process has confirmed the irreducible difficulties entailed in a broad approach to downstream transactions, for which no party has offered or could offer solutions. CN believes that the Board should either (a) leave the existing rule in place but broaden the class of persons entitled to petition for its waiver,[20] or (b) repeal the rule and leave to case-by-case determinations the extent to which, if at all, parties should have the opportunity, or merger applicants should be required in the first instance, to address announced downstream transactions. CN discussed the first of these alternatives in its ANPR comments. *See* CN ANPR Opening Comments 17-18, 27-28; CN ANPR Reply Comments 12, 22-24.

With respect to the second alternative, the Board could further provide that it will promptly announce the filing of a notice of intent in the Federal Register so that any party, promptly after publication of the announcement, could ask the Board (a) to determine whether and the extent to which it will entertain evidence relating to announced downstream transactions that the party wishes to introduce, and/or (b) to require applicants to address announced downstream transactions in the application, pursuant to an order under to 49 C.F.R. § 1180.4(b)(2)(v), which already authorizes the Board to identify "any additional information which must be filed with the application in order for the application to be considered complete." Applicants and other parties would be given an opportunity to reply to such a request.

If the Board considers the 30-day period to be insufficient to flush out downstream transactions, it could also allow parties to move the Board at a later stage in the proceeding to consider evidence that the party wishes to introduce concerning other announced transactions

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[19](...continued)
op. at 4-5 (STB served Dec. 28, 1999).

[20]At present, the Board's rules make no provision for waiver except at the request of applicants. *See* 49 C.F.R. § 1180.4(f).

(for example, up to the date for the filing of inconsistent applications). At a later stage, of course, it would likely not be possible under the statutory deadlines to require applicants to supplement their application, unless the schedule initially established for the proceeding was sufficiently less than the statutory deadlines so that some expansion of the schedule would not violate the deadlines.

In any event, if the Board adopts these approaches, it should state that it is unlikely that it would entertain or require evidence of *unannounced* or otherwise speculative or hypothetical transactions. The Board should further state that parties requesting consideration of announced downstream transactions will be expected to inform the Board as to why the party believes that the announced transaction is an effect of the pending transaction or otherwise ought to be considered, the evidence that the party wishes to introduce or expects to discover, why the party believes that the evidence would be probative and material with respect to the public interest determination in the pending proceeding, and why the party believes that the Board's consideration of the evidence will not jeopardize the manageability of the proceeding, the quality of information in the proceeding, or the statutory deadlines. Such information, provided in the context of a pending proceeding and with respect to an announced downstream transaction, would enable the Board to assess the plausibility and seriousness of the concerns, and to craft an order accordingly, taking into account surrounding questions, for example, disclosure of sensitive strategic information, and other as-yet unforeseeable issues that will inevitably arise.

These will not be easy standards to satisfy. They should not be easy, for all the reasons that have been discussed by CN and others. As CN stated during the ANPR, the consideration of downstream transactions "is too fraught with anticompetitive potential, too likely to impose costs that outweigh any regulatory benefits, and too little understood" (CN ANPR Reply Comments 25) for the Board to adopt rules requiring or allowing such evidence in all cases.

Consolidation. In addition to its proposal for abstract evaluation of a transcontinental structure, UP also suggests that the Board reserve the right to consolidate with a pending proceeding any application for another major transaction that is filed with the Board before the date set for the filing of inconsistent applications in the pending proceeding. UP Opening Comments 26.

CN believes that the Board already has authority to consolidate under its present rules (under which, as noted, the Board has waived the one-case-at-a-time rule). As a practical matter, however, consolidation is likely to be tantamount to joint substantive consideration of the consolidated applications. Consolidation should therefore occur only where the Board decides to take into account the later transaction under the downstream-transaction criteria that CN has outlined above. Consolidation must otherwise be reasonable in the circumstances and cannot jeopardize the statutory deadlines. Subject to these understandings, CN has no objection to UP's proposal, which neither commits the Board to consolidation nor establishes any presumption in favor of consolidation.[21]

Supplementation. BNSF refers to its proposal during the ANPR to require applicants to supplement their application to address any new competitive problems with their merger that would be created by any merger proposal filed with the SEC prior to the time that intervenor evidence is due in the STB merger proceeding. *See* BNSF Opening Comments 43. For example, the Board could review whether "an actual responsive merger somehow vitiated the effectiveness of remedies imposed to protect 2-to-1 shippers." *Id.* at 45. CN reads this proposal to carry an implicit assumption, with which CN disagrees, that

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[21]As CN stated during the ANPR: "The consolidation of already-massive proceedings subject to strict statutory deadlines, and under a standard that requires the Board to approve any transaction that is consistent with the public interest, would raise a host of issues, both legal and practical. Consolidation should be left to the concrete circumstances, if and when they ever arise." CN ANPR Reply Comments 27 n. 22. Among the difficulties would be the fact that the statutory deadline for the pending transaction would occur prior to the deadline for the later-filed transaction.

the pending merger should bear the burden of competitive problems created by the later merger.[22] Further, CN believes that the Board should not write rules that would predetermine how it will handle these situation-specific contingencies. Instead, the Board should retain latitude to craft appropriate solutions in light of concrete circumstances if and when they arise.

III. VOTING TRUSTS

Both CN and CSX commented in opposition to the Board's proposal to require Board approval of voting trusts and to apply a public interest standard in addition to the no-control test.[23] While several parties endorsed generally the Board's proposals relating to filings at the time of the notice of intent, which include the voting trust proposal, only one party, Edison Electric Institute ("EEI"), commented specifically in favor of the voting trust proposal.

EEI's comment only serves to illustrate how serious an error it would be for the Board to apply a public interest standard to voting trusts. EEI asserts that, had the voting trust proposal been in place prior the Conrail acquisition, the Board would have "considered whether to allow CSX and NS to spend most of the money they spent to acquire Conrail before they spent it, rather than after . . . and might well have agreed with . . . certain EEI members that it should not have allowed those expenditures." EEI Opening Comments 4 (emphasis in original). This kind of process would stand the statutory merger review on its head, by having the Board make a decision on the merits prior to rather than at the conclusion of the proceeding required by Sections 11324-325 of the ICCTA. As CN stated in its opening comments on the voting trust proposal, the Board "should apply the public interest

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[22]A case might be made for such an allocation of conditions where at least one of the applicants in the later merger is the same as one of the applicants in the pending merger. BNSF's suggestion is not so limited, however, and, even if it were, these sorts of contingencies are best left to case-by-case treatment.

[23]CN Opening Comments 21-22; CSX Opening Comments 66-76.

test as Congress intended to the merits of control transactions at the conclusion of a merger proceeding." CN Opening Comments 22.[24]

IV. TRANSNATIONAL

Few comments went beyond general endorsements of the Board's transnational proposals. As they do not add additional considerations, such comments do not require reply, beyond CN's opening comments on transnational mergers. CN here will comment on some additional matters raised by certain comments.

Full-system plans. The Board's basic proposal to require full-system impact analyses and operating plans in transnational mergers has widespread support, including the parties most likely to be affected, CN and CP. As the Board states in proposed § 1180.1(k), such plans will enable the Board to determine the "competitive, service, employee, safety, and environmental impacts of the prospective operations *within the United States.*" (Emphasis added); *see also* proposed § 1180,7(b) (market analyses); proposed § 1180.8 (operational data).[25]

CSX asks the Board to make clear that "the transborder materials need to be sufficiently separated in the full system presentations from the domestic data so that a public interest determination based on the public interest of the United States may be made." *Id.*

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[24]This is of course not to suggest that the Board is without power to make summary dispositions of defective applications. The Board must within 30 days of its filing reject an application that is "incomplete," and may dismiss an application without an evidentiary proceeding if the application fails to contain a prima facie case. 49 U.S.C. § 11325(a); 49 C.F.R. §§ 1180.4(c)(7)-(8); *Railroad Consolidation Procedures Expedited Processing*, 366 I.C.C. 767, 769-70 (1980).

[25]In the proposals relating to service assurance plans, there is one technical issue, not limited to transnational mergers, that CN wishes to bring to the Board's attention. The proposal would require "dwell time" and "on-time performance" information for principal yards and terminals. Proposed § 1180.10(c). The Board may wish to clarify what "on-time performance" information means with respect to yards and terminals; unlike dwell time, it is not a standard category for such facilities.

Under the rules proposed by the Board, it will be the applicants' burden to present evidence from which the Board may determine impacts in the U.S. CSX's proposed additional language would not usefully clarify that burden. Its meaning is unclear (what is the difference between "transborder materials" and "domestic data" with respect to the Chicago-Montreal corridor?). And it could cause mischief, for example, by providing opportunities for parties opposing transnational mergers to litigate allocation methodologies in a context where any allocation of benefits and costs must, in the end, be arbitrary because railroads are networks with economies of scope and scale.[26]

Ownership or directorship restrictions. CSX also urges that the Board require applicants to explain not only ownership restrictions imposed by foreign governments (proposed § 1180.11(b)) but "directorship or similar nationality or residence restrictions imposed by foreign governments or otherwise provided for in connection with the transaction." CSX Opening Comments 20-21. CN showed in its opening comments that there is no evidence to support either the Board's ownership proposal or any extension to directors and private contractual arrangements, and CSX offers none.

The Board's proposal would impose arbitrary burdens on foreign applicants, as would any such proposal with respect to directors, and would not square with NAFTA.[27] For example, the Board would be displacing without basis the day-in day-out judgments of the

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[26]For example, network-wide savings that may be enabled by a transaction, such as increased equipment utilization leading to lower costs, or savings from increased purchasing power, cannot be attributed on the basis of geography.

[27]Among other things, CN showed that ownership restrictions are common among U.S. railroads; for example, CSX can avail itself of statutory provisions in its state incorporation law designed to limit hostile takeovers, and, in addition, has adopted poison-pill provisions, which it recently amended in order to make it even more difficult for a bidder not favored by CSX's incumbent management to succeed. CN Opening Comments 32 n.38, 33-37. CN's position is that ownership restrictions do not raise issues under the public interest standard for either U.S. railroads or foreign railroads incorporated in a NAFTA signatory. *Id.* at 36-37. If the Board disagrees, then it should impose any requirements without regard to the applicant's nationality or the source of the applicable limitation.

capital markets, and would be making distinctions between domestic and foreign railroads that have no foundation. CSX's proposal would extend the discriminatory requirements to contractual arrangements, thereby exacerbating the error.[28] All of the proposals relating to transnational mergers suffer, among other things, from the same core defect: there is no evidence of a problem. Merger applicants should not be required to prove a negative – that a (non-existent) problem does not exist. If a party to a proceeding presents credible evidence of a problem, the Board can consider it at that time,

CSX is simply wrong when it asserts that parties invoking NAFTA[29] would "displace all of the Board's important concerns and its role in dealing with those issues." CSX Opening Comments 19. CN made clear that the Board "can stand ready to entertain credible evidence on any of these matters if and when proffered by a party to a proceeding." CN Opening Comments 24. What the Board cannot reasonably do is "require [applicants in a transnational merger] to bear a burden of coming forward with evidence in the first instance." *Id.*

Finally, DOD states that the requirement to address ownership restrictions imposed by foreign governments "will help DOD determine the effects on rail line maintenance and safety." DOD Opening Comments 6-7. CN does not see the connection. In any event, the operating plan, service assurance plan, and safety integration plan will provide ample information for DOD to identify any concerns.

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[28]Professor Black noted that the residency requirement for CN directors is a "minor matter" and that treating the 15% ownership restriction applicable to CN "as a negative factor in merger review will distort the market for corporate control far more seriously than the [ownership] rule itself could ever do." CN Opening Comments, Black V.S. at 19.

[29]North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1-9); 32 I.L.M. 605 (chs. 10-22), *available at* http://www.nafta-sec-alena.org/english/index.htm. As CN pointed out in its opening comments, NAFTA was approved by both Houses of Congress in the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 101(a)(1), 107 Stat. 2057, 2061 (1993), pursuant to sections 1101-1103 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. §§ 2901-2903.

DOT. DOT asserts that transnational mergers pose concerns not presented by domestic mergers. DOT Opening Comments 22-23. CN's opening comments appear to have anticipated and answered these contentions (*see* CN Opening Comments 27-30). CN would add only that DOT's comments confirm that its position rests on highly speculative concerns that do not provide a basis for imposing special requirements on foreign applicants. For example, DOT asks the Board to predicate a rule on speculations about the "authority, expertise, resources, or mandate" of safety enforcement agencies in NAFTA signatories. DOT Opening Comments 22-23. To the extent that a particular merger actually raises safety concerns, they will be identified and can be addressed in the safety integration plan and operating plan. That, and not a discriminatory rule, is the proper course.

National defense. In its opening Comments on the NOPR, CN stated that it did not object to the Board's proposal that would require applicants to "discuss and assess the national defense ramifications of their proposed merger" (CN Opening Comments 37) (citing proposed § 1180.1(*l*)). CN did object to the imposition of special requirements on applicants in transnational mergers. *Id.* at 37-38.

In its opening comments, the Department of Defense ("DOD") provides a list of defense subjects for applicants to address or, "[a]lternatively" that "the STB will consider in evaluating mergers." DOD Opening Comments 3. DOD's comments focus on the Strategic Rail Corridor Network ("STRACNET"), which is the designation given by DOD's Military Traffic Management Command Transportation Engineering Agency ("MTMCTEA") to those lines that MTMCTEA has determined are most important to national defense.[30] DOD's goal is to ensure that "rail mergers do not detract from the United States military's ability to deploy by rail." DOD Opening Comments 3.

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[30] *See* Robert S. Korpanty, *Preserving Strategic Rail Mobility*, Army Logistician, Nov.-Dec. 1999, http://www.almc.army.mil/alog/NovDec99/MS455.htm.

STRACNET assists the military services in their planning for defense-related transportation. STRACNET lines are not dedicated exclusively to military transport. Instead, like other lines, STRACNET lines are maintained in furtherance of a carrier's commercial interests in serving shippers (including DOD), and in compliance with its obligations respecting safety.[31] Abandonments of STRACNET lines are subject to the prior approval requirements of the ICCTA, like any other abandonments. MTMCTEA revises its STRACNET designations periodically, on the basis of "changes in traffic levels and installations, abandonments, and mergers," in order to "ensur[e] that the lines designated as part of the STRACNET are economically viable and are not likely to be candidates for abandonment." *Id.*

With certain exceptions discussed below, DOD's list of factors in its opening comments either identify issues that are not specific to mergers, domestic or transnational,[32] or relate to operational matters that all merger applicants would address in any event, so that no further rule is necessary.[33] The Board's proposal to require applicants to discuss the

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[31]FRA conducts annual safety inspections of STRACNET lines (*see* Korpanty, *Preserving Strategic Rail Mobility, supra*), which ensures that the railroads fulfil maintenance obligations that are independent of the designation of those lines as plart of STRACNET.

[32]These relate to plans for prioritization of DOD freight during war or other emergency, and agreements between DOD and carriers relating to those contingencies. There are statutory provisions that govern such circumstances. *See* 49 U.S.C. § 11124 (STB power to order cooperation, and directive to railroads to cooperate with Presidential orders); 10 U.S.C. § 2644 (President in time of war may "take possession and assume control of all or part of any system of transportation"). DOD can seek additional assurances or agreements on these matters at any time, without regard to whether a railroad happens to become a merger applicant.

[33]These relate to merger impacts on maintenance and operation of lines, routes and equipment, and on traffic levels over STRACNET lines under the control of the merging carriers. *See* DOD Opening Comments 3. Significant impacts will likely be covered in the operating plan and in the traffic diversion studies necessary to identify market and environmental impacts (insofar as changes exceed environmental thresholds). Because railroads do not dedicate lines to DOD use, they will have the normal commercial incentives to maintain and operate them.

"defense ramifications" of their transaction would provide additional defense-related information.

Several of the matters on DOD's list are directed toward mergers involving foreign applicants, but none of these requires an additional merger rule. First, DOD proposes that the Board require merger applicants to describe the "degree to which DOD traffic will be routed, as a result of the merger, over foreign lines." DOD Opening Comments 4. Given the location of rail lines in relation to international borders, there is relatively little traffic, other than traffic moving to or from foreign points, that would naturally be routed over foreign rail lines.[34] In any event, the traffic studies and operating plan already required in a major merger application would, as a matter of course, identify significant changes in traffic flows expected to follow from the merger as a result of new opportunities for efficient routings made available by that transaction. The Board's proposed rules would impose even greater specificity with regard to route-by-route service impacts. *See* proposed § 1180.10(a). Thus, DOD will know when merger applicants may be proposing to route traffic over foreign lines that is not now moving over such lines, and can object if it has concerns.[35]

Second, DOD proposes that the Board require railroad applicants to determine "the likelihood of assured access [by DOD] to [foreign] rail lines [used for DOD freight] in time of war or other contingency." DOD Opening Comments 4. This suggestion is a follow-on to

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[34]The principal current source of U.S.-Canada-U.S. routing is traffic moving between Michigan, on the one hand, and, on the other, New York or New England, via routes in southern Ontario and southern Quebec. That is an existing situation that would not be an impact of any merger, and which DOD is free to raise with the railroads today.

[35]In addition, DOD and other shippers would continue to have the statutory right to direct the merged railroad to route their freight over established through routes that are different from the routings projected by applicants (*see* 49 U.S.C. § 10747(a)(1)). Further, merger applicants will be required to maintain major gateways. *See* proposed § 1180.1(c)(2). Given DOD's right to determine routings, no DOD traffic not presently moving over foreign lines will be routed over foreign lines as a result of a merger and contrary to DOD's wishes. For that reason, in addition to the information that already is contained in traffic diversion studies and operating plans, DOD's proposal that applicants be required to state the degree of re-routing of DOD traffic over foreign lines is unnecessary.

DOD's concern that military traffic might be routed over foreign lines contrary to DOD's wishes, which, as just discussed, is not likely. In any event, making that determination would amount to predicting the likelihood that foreign governments will attempt to bar DOD traffic from railroads within their jurisdiction. Rail applicants have no particular ability to make such predictions, and the Board would gain little from requiring applicants to speculate on such matters. These are government-to-government issues that DOD may pursue with the foreign government. If these efforts have revealed concrete concerns of relevance to a particular proposed merger, DOD would be free to raise them in that merger proceeding; no rule amendment is necessary in this regard.[36]

Third, DOD would have the Board require transnational merger applicants to describe the ability of a foreign acquirer "to sell its ownership or controlling interest [in a U.S. rail carrier] to a third party without further regulatory review and approval." DOD Opening Comments 4. The answer to that jurisdictional question is found in the control provisions of the ICCTA, and could not be illuminated by any factual information that a merger applicant could submit in a merger proceeding. A foreign entity acquiring control of a U.S. railroad in a regulated transaction has the same ability as a domestic acquirer to transfer its interest in that railroad to a third party in an unregulated subsequent transaction. If the third party is a rail carrier or is affiliated with a rail carrier (or is not so affiliated but is proposing to acquire two rail carriers), then the transfer is subject to Board review and approval. 49 U.S.C. § 11323(a). If the transferee is not within the categories enumerated in the statute, the

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[36]If DOD is concerned that the government of Canada -- which was allied to the United States in two world wars, is the only other country that is part of NORAD, and is now the closest NATO ally of the United States -- might block U.S. defense traffic, DOD could seek further assurances from the government of Canada or could avoid dependency on Canadian routings. As already noted, through routes using only U.S. rail lines that were established before a merger would remain available after a merger. CN notes that DOD's Military Traffic Management Command is staffed not only with representatives of the U.S. Army, Navy, Air Force, and Coast Guard, but also with representatives of the Canadian Armed Forces. *See* MTMC *Strategic Plan 2000*, at 10, *available at* http://144.101.37.132/compress/1/about1.htm ("Strategic Plan" link).

transfer is not subject to the Board's jurisdiction.[37] These statutory categories do not depend on the nationality of the transferor or transferee.

Other proposals relating to transnational mergers. A number of parties urge an assortment of additional rule changes that would apply to transnational mergers involving a Canadian railroad. None of these proposals should be adopted.

National Grain and Feed Association ("NGFA") asserts that proposed § 1180.1(k) should specifically require "applicants to a transnational transaction" to "address cross-border car distribution, marketing, and route rationalization issues." NGFA Opening Comments 14. NGFA states that it "does not believe that it suffices to require the applicants to present evidence only as to the United States rail network." *Id.*

The Board's proposed rules, however, are not so limited, and the additions sought by NGFA are unnecessary and unwarranted. Proposed § 1180.1(k) requires transnational applicants to file "full system" plans "incorporating their operations in Canada or Mexico." This requirement is reiterated in the operational data section of the proposed rules (proposed § 1180.8(a)). In addition, the Board's proposed (and existing) requirements for market analyses, operating plans, and the filing of concurrent related applications for authority to construct or abandon rail lines already insure that applicants will cover impacts on operations within the United States. *See* proposed §§ 1180.7 (market analyses); 1180.8 (operational data, including equipment requirements, acquisitions, and retirements, and improvements in equipment utilization); 49 C.F.R. § 1180.4(c)(2) (concurrent applications for related abandonment authority). These are provisions that CN does not oppose, so long as they are reasonably applied.

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[37] *See, e.g.*, Letter from Heather J. Gradison *et al.* (Chairman and members of the ICC) to Senator J. James Exon, Re: *Chicago & N.W. Transp. Co. - Transportation Ramifications of Acquisition by Japonica Partners, Ex Parte No. 480* (May 15, 1989), at 9-11 (finding no jurisdiction under predecessor to 49 U.S.C. § 11323).

The North Dakota Public Service Commission and various North Dakota grain interests ("NDPSC") ask the Board "to insure rate and service parity in geographic regions and industries that span the border and which are served on both sides of the border by a merged carrier." NDPSC Opening Comments 5. Although not complaining that their individual rates are unreasonable (*id.*), they claim that recently "cross-border rate disparities have arisen with CP Rail," and in particular that "significant rate spreads on wheat now exist between North Dakota and Saskatchewan." *Id.* at 4.

There is, however, no nexus between such continuing or future cross-border disparities and future rail consolidations.[38] And even if somehow NDPSC could establish such a nexus in a particular proceeding, the Board has long recognized, and reiterates in its proposed rules, that it is "generally not appropriate to compensate parties who may be disadvantaged by increased competition." Proposed § 1180.1(d). Moreover, price disparities are the result of the pricing freedoms provided by deregulation. Imposing the conditions sought by NDPSC would be a giant step backward to the discredited days of rate equalization and broadly proscribed price-discrimination.

ACC/APC urge the Board to "affirm that shippers of international traffic should have all rights regarding interchange, interswitching and competitive access that they now have under Canadian (or Mexican) law." ACC/APC Opening Comments 7-8, 15. They attach a

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[38]NDPSC states that its grain shippers must compete with grain shippers served by CN/IC, and that the Board's decision approving CN's acquisition of IC "acknowledged North Dakota's plight in this regard when it imposed a condition." *Id.* at 4. NDPSC, however, can draw no support from that decision. The issue raised by North Dakota interests in the CN/IC proceeding was whether CN would close or restrict its Chicago gateway for grain movements originating on CP's Soo Line subsidiary so as to favor its own new single-line movements of grain from CN origins in Canada to the Gulf of Mexico. *CN/IC*, Decision No. 37, slip op. at 37. CN pointed out that it could not close its Chicago gateway with Soo Line without losing its participation in that grain traffic, and that it had no intention of closing the CP/IC gateway in Chicago. *Id.* Given that assurance, the Board merely held CN to its representation. *Id.* As CN reported in the *CN/IC* Oversight proceeding, "the Chicago gateway remains open for North Dakota grain" and CN "has not increased its revenue requirements for CP-originated grain shipments moving through Chicago." *CN/IC [General Oversight]*, Finance Dkt. No. 33556 (Sub-No. 4), Decision No. 2, slip op. at 5.

statement of Terry A. Park, who describes Canadian rights to mandated interswitching and competitive line rates, and who urges the Board to make clear in its "merger rules " that these remedies "will continue to be available." Park V.S. at 3-4. The rights, however, are matters of Canadian law, administered by Canada, applicable only to shippers and carriers within Canada, and subject to repeal or amendment only by the Canadian government. The applicability of these rights is committed to Canadian authorities and not the Board.[39]

Whereas the ACC/APC mistakenly ask the Board to preserve Canadian rights that are applicable in Canada, The Montana Wheat & Barley Committee and other U.S. western wheat, grain, and barley interests (together, "MW&BC") seem to ask the Board (also mistakenly) to import elements of Canadian regulation into the U.S. They assert that the Board should somehow "utiliz[e] the other country's rules and regulations to mitigate impacts on rail customers." MW&BC Opening Comments 4; *see also id.* at 5 ("options such as . . . joint running rights, . . . and arbitration to maintain competition must be available to mitigate anti-competitive effects of mergers."). The Board, however, has a long history of mitigating anticompetitive effects of mergers, and it does not need to import Canadian regulation to do so. Moreover, as with the open access issues that the Board has properly considered to lie outside the scope of its merger rules (*see* NOPR 16-17)), importing foreign access and other regulatory provisions in the guise of merger rules would be an inappropriate use of the Board's merger rulemaking authority.

Finally, the Lumber Fair Trade Group ("LFTG"), which fails to identify any members but claims to represent a number of independent wholesale distributors of forest products, asks the Board to assist it in its dispute with lumber mills in British Columbia concerning so-called "Phantom Freight" charges by the mills. LFTG Opening Comments 1. LFTG describes "Phantom Freight" charges as the mills' "addition of unsubstantiated and overstated

[39]The rights provided under Canadian law are available to all shippers within Canada, whether U.S. based or Canadian based.

freight costs" on shipments from the mills to distributors that are sold FOB origin plus an amount represented by the mill as the delivered freight cost to destination. LFTG asks the Board to impose a requirement in transnational transactions for the "retention of full and complete [freight] records within the jurisdiction of the STB and the U.S. courts" so as to facilitate a potential antitrust action in the U.S. against Canadian mills. *Id.* at 1-2. This is a long standing issue that relates to antitrust enforcement and not to mergers.[40] The present proceeding provides no occasion for Board action addressing this matter.[41]

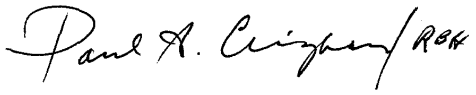
[40]It has not been CN's practice to quote contract rates to lumber wholesale distributors for movements FOB mill where those distributors cannot guarantee any specific volume of traffic. CN does, however, quote tariff rates for such movements, and LFTG does not challenge either CN's rates or practices.

[41]Related issues were belatedly raised in the *CN/IC* proceeding. The Board found no nexus to the transaction, and insufficient evidence to support any findings. Noting that the Department of Justice had referred the allegations to the FTC, the Board stated that any merger-related harms could be addressed in the *CN/IC* oversight proceeding. *CN/IC* Decision No. 37, slip op. at 39 & n.95. No party raised the issue in the oversight proceeding.

CONCLUSION

As CN discussed in its opening comments, there are provisions in the Board's proposals relating to operations, service, safety, and market impacts that would appropriately facilitate the Board's increased scrutiny of major rail mergers. This rulemaking has yet to identify a legitimate issue under the public interest standard that the Board could not more than satisfactorily resolve through reasonable applications of those provisions. The record confirms that there is no need, and the potential for adverse consequences is too great, to press beyond and indulge large unproven assumptions or test statutory authority.

Respectfully submitted,



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December 18, 2000

APPENDIX

FTC WORKSHOPS

The FTC this year convened a workshop whose goal was to "enhance understanding of how B2B electronic marketplaces function and the means by which they may generate efficiencies, and to identify any antitrust issues that they raise." FTC, Public Workshop: Competition Policy in the World of B2B Electronic Marketplaces, 65 Fed. Reg. 30,120, 30,121 (May 10, 2000). The workshop, held over a two-day period in June, heard from 65 panelists, including B2B entrepreneurs, antitrust practitioners, economists, and scholars. The Federal Register notice identified specific issues, and invited both oral presentations and written comments.

In 1995, the FTC held a similar workshop, directed to gathering information on whether the growth of global markets and high technology might warrant changes to U.S. competition policy, including merger review and consumer protection. FTC, Hearings on FTC Policy in Relation to the Changing Nature of Competition, 60 Fed. Reg. 37,449 (July 20, 1995). Here, too, the FTC obtained a broad range of views from representatives of business and consumer groups, government officials, legal practitioners, economists, and other scholars.[42]

In addition to illustrating a useful mechanism, these examples bear brief further description for their conclusions as well. After the B2B workshop, the FTC staff issued a report and found that, despite the newness of the technologies and business concepts, B2Bs are amenable to traditional antitrust analysis. FTC Staff, *Entering the 21st Century:*

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[42]The globalization and technology proceeding included hearings over 27 days, covering a vast range of substantive and procedural issues, involving both globalization and technological innovation across multiple industries. (For example, one of the 11 major areas was the relationship of intellectual property and antitrust law, which is a burgeoning area in and of itself.) The question of transcontinental rail mergers is considerably narrower, and the Board already has the benefit of the testimony in its March, 2000 hearing, and the comments in the ANPR and this NOPR. Accordingly, a workshop of four to five days would seem more than sufficient, if focused specifically on transcontinental mergers.

Competition Policy in the World of B2B Electronic Marketplaces, Executive Summary at 2 (Oct. 2000), *available at* http://www.ftc.gov/os/2000/10/b2breport.pdf. The report recognized that certain features of these electronic markets could, in certain conditions, create a potential for competitive harm, but concluded that the "*fact-specific nature of these inquires makes specific conclusions as to the competitive consequences of the various exclusivity practices impossible.*" *Id.*, Part II at 34 (emphasis added); *accord id.*, Executive Summary at 5 (noting "highly fact-intensive" nature of these inquiries).

Similarly, the FTC staff prepared a report on globalization and technology in which it concluded that the agency should "continue its careful approach to the development of competition policy, considering government intervention in markets the exception rather than the norm." FTC Staff, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*, Epilogue at 2 (May, 1996), *available at* http://www.ftc.gov/opp/global/report/gc_v1.pdf. The report stated:

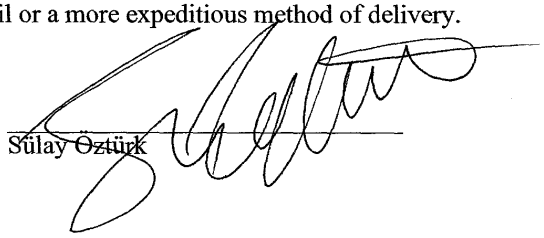
> Effective antitrust enforcement requires rules and processes that facilitate accurate judgments in the face of inherent uncertainty. We agree with the many witnesses who stated that *development of such rules and processes depends on a cautious approach, reliance on specific facts*, a willingness to learn from the past, transparent decision making, and the articulation of competition values whenever antitrust policy is being made.

Id. Epilogue at 2-3 (emphasis added).

CN expects that an STB workshop properly focused on transcontinental mergers would reach the comparable conclusion in the context of the ICCTA: that the question whether a transcontinental merger would be in the public interest is best considered when the Board is presented with a proposed merger involving a U.S. Western and U.S. Eastern railroad. The Board will then be able to evaluate the public interest effectively and accurately in the context of that proceeding.

CERTIFICATE OF SERVICE

I certify that I have this 18th day of December, 2000, served copies of the foregoing Reply Comments of Canadian National Railway Company upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery.



Sülay Öztürk